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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 73-514

PRINCE GEORGE'S COUNTY, MARYLAND,
Petitioner,

v.

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,
Respondent.

BRIEF IN OPPOSITION OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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The undersigned attorneys, on behalf of Respondent Maryland-National Capital Park and Planning Commission, Appellees below in Case No. 269, September Term, 1972, of the Court of Appeals of Maryland oppose the Petition for a Writ of Certiorari to review the final judgment and decision of the Court of Appeals of Maryland in said case.

OPINION BELOW

The opinion of the Maryland Court is reported at 306 A.2d 223 (advance sheets).

JURISDICTION

This Honorable Court has jurisdiction under 28 USC § 1257(3) to review the final judgment of the Court below on Certiorari.

QUESTION PRESENTED

(i) Whether the Federal question alleged to exist in this case, 1) has been presented in a proper and timely manner to the court of original jurisdiction and to the Maryland Appellate Court, 2) has been preserved by the presentation of evidence in the Court of original jurisdiction and preserved in the Maryland Appellate Court, 3) has been ruled on by the Court of original jurisdiction and by the Maryland Appellate Court so as to entitle Petitioner to invoke this Court's jurisdiction?

(ii) Whether the judgment of the Maryland Court rests independently on adequate State grounds thereby disentitling the petition for review?

STATEMENT OF THE CASE

The petitioner did not comply with Rule 23(f) of the Supreme Court Rules by stating clearly, a) the stage in the proceedings in the Court of first instance and in the Appellate Court, at which, and the manner in which, the Federal question sought to be reviewed was raised, b) the method of raising them, and c) the way in which they were passed upon by the Court, with pertinent quotations of specific portions of the record as will show that the Federal question was timely and properly raised so as to give the U.S. Supreme Court jurisdiction to review the judgment on Writ of Certiorari.

If the Petitioner sets out these facts in detail as required by the rules, the grounds for Certiorari would

not be present and the writ would not be granted; to avert such a result a sweeping statement was made on page 11 of the petition that the question was argued extensively in the Circuit Court and in the brief and argument before the Appellate Court. This brief is filed to bring the facts relating to the Petitioners failure to raise and preserve the alleged Federal question to the attention of this Honorable Court and to thereby oppose the Grant of Certiorari.

The Respondent adopts the factual portions of the Petitioner's statement of the case for the purpose of this brief, but reserves the right to set out a Respondent's Statement of Facts, and denies the inferences made by the Petitioner from those facts. The record in this case clearly establishes that the Petitioner in the Petition for Certiorari (page 11) made an incorrect and misleading statement, to wit:

> "Petitioner had argued extensively to the Chancellor in the Prince George's County Circuit Court that his ruling deprived the citizens and voters of the County of the equal protection of the laws, as guaranteed by the Fourteenth Amendment, in that they were effectively precluded from exercising direct elective input, through the initiative and referendum, in crucial matters involving planning and zoning, while voters of other Maryland chartered counties were so entitled. Petitioners also argued that there was no rational foundation for such an invidious and discriminatory classification."

Respondent submits that Petitioners Answer filed in response to the original Bill of Complaint fails to allege the Federal issue now complained of and that the Federal question was not an issue during the trial of the original lawsuit. The transcript of the Prince George's

County Circuit Court hearing will reveal that Petitioners offered no evidence and did not argue the alleged Federal question and consequently the original Circuit Court Opinion of July 6, 1972 did not mention or consider the Federal issue. The Prince George's County Circuit Court in its Supplemental Opinion of August 3, 1972, filed in response to Prince George's County's Petition For Rehearing And For Clarification Of The Opinion made the following observations on the alleged Federal question, which throws light on the manner in which this contention was presented:

> "14. The Defendant's Fourteenth proposition requests the Court to rule upon a question involving the validity of Section 2 of Chapter 614 of the Acts of 1959 in the light of the Fourteenth Amendment to the United States Constitution. This matter was not heretofore covered in depth and no evidence was offered, that the Court can recollect, bearing on it. Further, it would seem that this matter was abandoned by the County in argument upon the Petition for Rehearing as the Court's notes taken at that time fail to show any consideration of this matter. In any event, the Court does not feel justified in deciding this matter on the present state of the record, and we decline to make any finding with respect thereto."

The Petitioner further states on page 11 of the Petition that:

> "The same argument was made to the Court of Appeals by brief and oral argument, and was renewed in a post-decision Motion for Reargument and Reconsideration.

This statement is also incorrect and misleading. In the Maryland Court of Appeals the Petitioner's Brief raised thirteen contentions. None of them presented a Federal question. The Court of Appeals considered

each point, answered each point, and rested its decision solely on Maryland Law. The Appellant's Brief did not contain any references to the Federal question now alleged to be violated.

In the Petitioner's Reply Brief before the Maryland Court of Appeals the Petitioner for the first time on Appeal raised the Federal question on the basis of which certiorari is now sought to be obtained. Appellee Maryland-National Capital Park and Planning Commission, quoting Rule 885 of the Maryland Rules of Procedure, filed a Motion to Strike Portions of the Reply Brief on the ground that the argument on the Federal constitutional issue was not argued or presented in the Circuit Court and that the intent and purpose of the reply brief would be defeated if new points are raised in the Court of Appeals by way of a Reply Brief. In addition, during oral argument to the Maryland Court of Appeals at no time did Petitioner mention or argue the Federal question to the Court.

The Maryland Court of Appeals in its Opinion (306 A.2d 223-237) considered only the 13 contentions raised by the Prince George's County in its original Brief answered each point and rested its decision solely on Maryland Law.

Prince George's County filed a Motion For Reargument And Modification in the Court of Appeals, in which the argument based upon denial of equal protection to the citizens of Prince George's County was raised for the second time. This Motion was denied and the adjudication and decision by the Maryland Court of Appeals became final. The State Court's decision was based entirely on Maryland Law and the Federal question alleged to exist in this case was not adjudicated

or considered by either the Prince George's County Circuit Court or the Maryland Court of Appeals.

SUMMARY OF ARGUMENT

The Petitioner Prince George's County did not raise the Federal constitutional question, allegedly involved in this case, in a proper and timely manner at the first instance in the Court of original jurisdiction. The Petitioner did not present evidence or argument to the Circuit Court or Appellate Court in order to preserve the question throughout the entire proceedings. The matter was adjudicated by the State Courts so as to enable a review of the State Court's decision in this Honorable Court by invoking certiorari jurisdiction. The decision of the Court below is solely and entirely grounded on application of State law and hence it is inappropriate to invoke the certiorari jurisdiction of this Honorable Court to review the decision. Moreover the grant of certiorari being discretionary with this Honorable Court, the Petitioner not having stated truly and honestly, the original failure to raise the Federal question in the Courts below and the belated stage at which it was raised, disentitled itself to the exercise of discretion in its favor. Page 11 of the Petition reads as though the Petitioner is deprived of the right to raise a Federal question by the State Court because of a lack of sympathy and appreciation of the equal protection doctrine, which does not reflect the true facts of the case.

ARGUMENT

I. Whether the Federal Question Alleged To Exist in This Case, 1) Has Been Presented in a Proper and Timely Manner to the Court of Original Jurisdiction and to the Appellate Court, 2) Has Been Preserved by the Presentation of Evidence in the Court of Original Jurisdiction and Preserved in the Appellate Court, 3) Has Been Ruled on by the Court of Original Jurisdiction and by the Appellate Court So as To Entitle Petitioner To Invoke This Court's Jurisdiction

The Petitioner's statement in the petition for certiorari that the Federal question was "argued extensively to the Chancellor in the Circuit Court that his ruling deprived the citizens and voters of the County of the equal protection of laws as guaranteed by the Fourteenth Amendment" cannnot be taken to be true in the face of the express statement in the Chancellor's Supplemental Opinion of August 3, 1972, that this matter was "abandoned by the County in argument upon the petition for rehearing as the Court's notes taken at that time fail to show any consideration of this matter." If the County felt that this statement by the Chancellor was untrue and it had, in fact, been "argued extensively", the proper procedure to follow is indicated by Rule 826(e) of the Maryland Rules of Procedure which requires that "if the difference arises as to whether the record truly discloses what occurred in the Lower Court, the difference shall be submitted to and settled by the Lower Court and the record made to conform to the truth." Since the Petitioner did not avail the procedure prescribed by the rule, the Petitioner must be deemed to have accepted the statement of the Circuit Court as true.

In the Maryland Court of Appeals, the Petitioner similarly did not raise this contention in the Appellate

Brief. It was only in the Reply Brief that the Petitioner (County) raised this question and the Respondent (M-NCPPC) objected to its being raised for the first time in the Reply Brief. Maryland Rules of Procedure § 885, provides that the Maryland Court of Appeals

> "will not ordinarily decide any point or question which does not plainly appear by the record to have been tried and decided by the Lower Court; but where a point or question of law was presented to the Lower Court and a decision of such point or question of law by this Court (Maryland Court of Appeals) is necessary or desirable for the guidance of the Lower Court or to avoid the expense and delay of another appeal to this Court, such point or question of law may be decided by this Court (Maryland Court of Appeals) even though not decided by the Lower Court."

This rule enunciates the longstanding practice in Maryland since the year 1825. *Gordon* v. *State National Bank,* 249 Md. 378, 239 A.2d 915 (1968); *Friedman* v. *Clark,* 252 Md. 26, 248 A.2d 867 (1969). Under this rule where a question was not presented until it was raised in the Appellant's Reply Brief the Court of Appeals refuses to decide it. *Rose* v. *Paape,* 221 Md. 369, 157 A.2d 618 (1960).

In the instant case, the Circuit Court decided only the 13 issues on which evidence was presented and argued to the Court. The Maryland Court of Appeals in like manner addressed itself to the issues presented in Petitioner's Brief and which were argued to the Court. In the U.S. Supreme Court, the timeliness with which a Federal question is raised, is critical and the question must be raised at the first stage of the proceedings as required by State law. *Edelman* v. *California,* 344 U.S.

357, 73 S.Ct. 293, 97 L.Ed. 387 (1953); *Street* v. *New York,* 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed. 572 (1969). To satisfy the requirement as to the preservation of the question the Petitioner must not only raise the question at the appropriate stage before the Trial Court, but also before the Appellate Court as required by the rules of the State. *Beck* v. *Washington,* 369 U.S. 541, 82 S.Ct. 955, 8 L.Ed. 98 (1969). Raising a Federal question in a petition for rehearing before the State Appellate Court was held to be too late, so as to preclude review by the Supreme Court *vide*: *Herendon* v. *Georgia,* 295 U.S. 441, 55 S.Ct. 794, 79 L.Ed. 1530. For this reason alone the petition for certiorari must be denied.

II. The Judgment of the Court Below Rests Independently on Adequate State Grounds and Thereby Disentitles the Petition for Review.

The Petitioner in the Reply Brief before the Maryland Appellate Court contended as follows:

> "Appellant contends that this Court can resolve the matters at issue herein in its favor short of any constitutional ruling, but if this Court feels that it cannot do so, then the Constitution of the State and of the United States are clear barriers to the results contended for by the Appellee in its brief."

The Court below "short of any constitutional ruling" resolved the matters at issue entirely on the basis of State law; the result, which is not to the liking of the Petitioner, is the cause for this petition for certiorari. The U.S. Supreme Court will not "review judgments of State Courts that rest on adequate and independent grounds"—Justice Jackson in *Herb* v. *Pitcairn,* 324 U.S. 117, 89 L.Ed. 789, 65 S.Ct. 459 (1945); *Scripto, Inc.* v. *Carson,* 362 U.S. 207, 80 S.Ct. 619, 4 L.Ed.2d 660 (1969).

A perusal of the Opinion of the Court below would show that its decision rests on adequate State grounds and there was no mention of any Federal question as either having been raised or presented for adjudication. The petition for certiorari must, therefore, be denied.

The Respondent objects to the inclusion in the Appendix to the Petition for Certiorari of portions of the charters of Baltimore City (Appendix E), Harford County (Appendix F), Anne Arundel County (Appendix G), Howard County (Appendix H), Baltimore County (Appendix I), as being not part of the record in the Court below; however, the present submission of these charters illustrates the failure to introduce evidence on the alleged Federal question in the Circuit Court and the total failure to make a record to preserve the question for review. It follows that without a record there is no Federal issue for review.

CONCLUSION

For the aforesaid reasons the Respondent prays the petition for certiorari may be denied.

Respectfully submitted,

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Certificate of Service

I hereby certify that on this —— day of October, 1973, three (3) copies of the Brief in Opposition of Petition for Writ of Certiorari to the Court of Appeals of Maryland were mailed to Walter H. Maloney, Jr. and James F. Sharkey, Attorneys for the Petitioner, Court House, Upper Marlboro, Maryland 20870.

I further certify that all parties required to be served have been served.

SANFORD E. WOOL